DAVID A. ROSENFELD, Bar No. 058163
WEINBERG, ROGER & ROSENFELD
A Professional Corporation
1001 Marina Village Parkway, Suite 200
Alameda, California 94501
Telephone (510) 337-1001
Fax (510) 337-1023
E-Mail: drosenfeld@unioncounsel.net

Attorneys for TEAMSTERS UNION LOCAL NO. 206

UNITED STATES OF AMERICA

NATIONAL LABOR RELATIONS BOARD

REGION 19

TEAMSTERS UNION LOCAL NO. 206, and SAFEWAY, INC.	Case 19-CB-168283 19-CB-178098 19-CB-192630

RESPONDENT'S RESPONSE TO TEAMSTERS LOCAL 305'S AMICUS CURIAE BRIEF IN SUPPORT OF SAFEWAY, INC.'S AND GENERAL COUNSEL'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION

I. INTRODUCTION

The amicus brief submitted by Teamsters Local 305 ignores the basic legal framework of this case. The question before the Board is whether Local 206 violated the Act by insisting that the Employer *not* recognize Local 305 as the representative of a consolidated warehouse without a Board election. Because the employees of the two warehouses that were consolidated had previously been represented by different unions, the Act prohibited the Employer from recognizing Local 305 as the exclusive representative of a consolidated bargaining unit unless Local 305 had previously represented a "sufficiently predominant majority" of that unit. The Administrative Law Judge correctly found Local 305 did not have a sufficiently predominant majority. Therefore, Local 206 did not violate the Act by insisting that the Employer not recognize Local 305.

Local 305's arguments support the rationale of the Administrative law Judge. When analyzed those arguments explain why the "sufficient predominant majority" principle must apply here.

Local 305 devotes much of its brief to arguments about the status of Local 206's contract and other issues it claims would arise during the transition process, prior to a Board election. These arguments are irrelevant to the question of whether the Employer should have recognized Local 305 without an election. Local 305's claims about the transition process are also legally inaccurate.

Local 305 relies heavily on arguments about what bargaining unit or units would be appropriate in the consolidated warehouse. These, too, are irrelevant. The question before the Board is not whether an election should occur in a wall-to-wall unit or in several smaller ones. It is whether the Employer was required to circumvent the election process entirely. Local 305 did not have a sufficiently predominant majority in the bargaining unit for which it was recognized. Therefore Local 206 was entitled to object to that recognition.

Other errors Local 305 makes include counting its presumed supporters multiple times but those of other unions only once; relying on single-union precedent in a multiple-union case;

and arguing that the Employer will fire supporters of other unions if the Board allows employees to choose for themselves whether they wish to be represented by Local 305.

II. THE QUESTION HERE IS WHETHER THE EMPLOYER HAD TO RECOGNIZE LOCAL 305 WITHOUT AN ELECTION

Most of Local 305's complaints about the ALJ's holding are irrelevant to the only issue in this case: whether the Employer was required to recognize Local 305 without an election.

The posture of this case is that Albertsons filed charges against Local 206 alleging that Local 206 insisted on illegal subjects of bargaining. Administrative Law Judge Decision, October 31, 2017, p. 1-2 ("ALJD"). As found by the ALJ and detailed in Local 206's brief, what Local 206 insisted on was that the Employer *not* recognize Local 305 for the combined, post-transfer warehouse without a Board election. ALJD p. 7-8, 10-13, 23-28; Respondent Brief on Exceptions, p. 2-15. This proposal is illegal only if the Employer was required to recognize Local 305.

The ALJ correctly found that the Act prohibited the Employer from recognizing Local 305 without an election. ALJD p. 17-22; Respondent Brief on Exceptions, p. 15-29. Therefore, Local 206 did not violate the Act by refusing to be bound by that recognition.

The ALJ rejected the argument that Local 206 insisted on the application of its contract to the combined warehouse. ALJD p. 7 FN 18, 13 FN 33, 15 FN 38; *see also* Respondent Brief on Exceptions, p. 4-5, 7-11. As explained in Local 206's prior brief, the ALJ made his determination using the Employer's own notes and was correct to do so. *Id.* Therefore, it does not matter whether Local 206 could have insisted on application of its contract or for how long. Local 305's arguments about the application of contracts during the transition process are irrelevant to the outcome of the question before the Board in this case: whether Local 206 violated the Act by insisting that the Employer not recognize Local 305 for the post-consolidation warehouse without an election to allow the employees to choose their representative or none at all.

III. LOCAL 305'S CLAIMS OF HARDSHIP IGNORE SETTLED LAW

The Board need not determine what the Employer should have done in this case, beyond the question what it did which was to unilaterally recognize Local 305 without an election. That said, Local 305's claims of hardship for itself and the Employer are inaccurate as well as irrelevant. The Employer had an obligation to bargain the terms of the transition process with all unions. It had no obligation to recognize any union for the post-consolidation warehouse until that union was certified by the Board.

First, Local 305 argues that the ALJ's holding would place "a legal obligation upon all three unions to fight each other over who represents" various employees and to file ULPs and grievances as part of this fight. Amicus, p. 3-4. The ALJ held precisely the opposite, namely that the consolidation gave rise to a question concerning representation ("QCR"). ALJD p. 21-22. The Employer or any union was free to file a representation petition with the Board to resolve the QCR.[1] 29 C.F.R. § 102.60(a). Each union would then be free to participate in an election or disclaim interest, as it saw fit. Nor would there be any question as to which union was responsible for the enforcement of any transition agreement – each union would be responsible to enforce any transition agreement it had negotiated for the members covered by that agreement, namely those who had been in its bargaining unit prior to the consolidation. *UFCW Local 540 v. NLRB (Wal-Mart Stores, Inc.),* 519 F.3d 490, 495-96 (D.C. Cir. 2008).

Next, Local 305 argues that it would be untenable or illegal for different workers doing the same work to receive different wages. Amicus, p. 4-5. This is nonsense. Even Local 305's own contract provides for this by "red circling" the wages of employees who were paid more

[1] As set out in Local 206's prior brief, Local 206 did not file a petition itself because the Regional Director made clear early on he would dismiss it. Respondent Brief on Exceptions, p. 29-30. Nor was it obligated to do so. The lack of an election in this case is due to the Regional Director's failure to properly apply settled Board doctrine concerning mergers by issuing complaint, not due to any flaw in that doctrine or in the ALJ's holding that an election would have been proper. Had the Regional Director declined to issue complaint, Safeway or Local 305 could have resolved the representational issue by a representation petition, either an "RC" or an "RM" petition.

under their prior contract than the rate provided for in the Local 305 CBA. GC 51, p. 33. These and other differences in contract terms for different employees doing the same work are obviously quite common in labor agreements unless based on sex or some other illegal characteristic. They are improper if based on union membership *per se* but proper if based on other aspects of employment history, such as what bargaining unit(s) the employee has worked in or what wages the employee previously earned. ALJD p. 26; *Compare Schick v. NLRB*, 409 F.2d 395, 398-99 (7th Cir. 1969) (difference in seniority rights according to what bargaining unit employee had previously worked in permissible) *with Teamster Local 435 v. NLRB (Super Value)*, 92 F.3d 1063, 1070 (10th Cir. 1996)(difference based on hostility towards unit that had refrained from union participation violates Act). Of course, any party to the transition negotiations including Safeway was also free to propose changes to wages and benefits to ensure uniformity.

Finally, Local 305 predicts "mind-boggling" seniority disputes. Amicus, p. 5. It is entirely settled that the merger of seniority lists is a mandatory subject for effects bargaining. *See, e.g. Dodge of Naperville, Inc.*, 357 NLRB 2252, 2253-54, 2257 (2012) (majority and dissent, respectively); *PCMC/Pac. Crane Maint. Co.*, 359 NLRB 1206, 1210 (2013), reaffirmed 362 NLRB No. 120 (2015). The Employer in this case had an obligation to bargain with both Local 206 and Local 305 about the merger of their seniority lists. An employer can certainly generate problems for itself by finalizing an agreement with one union prematurely without the consent of the other – as the Employer in this case did – or by agreeing to conflicting provisions with different unions. However, the employer is under no obligation to do either of these things. It can instead bargain in good faith with both unions about how their demands can be reconciled until it either reaches agreement with both unions or reaches impasse with one or both. Upon impasse, the employer can implement its last, best offer. Either way, an employer who follows the law will have a single unified seniority list it can apply during the transition.

Ironically, the best way to ensure a smooth transition was precisely what Local 305 and Albertsons resisted: a timely Board election to determine the permanent representation status of the combined warehouse.

What the Act required in this case was not the legal maneuvering predicted by Local 305 but employee free choice. As stated by the ALJ, "Simply put, the representational rights of employees to not belong to unions (or employers) to be traded or given away; only employees get to choose who represents them. Such principle lies at the heart of the concept of industrial democracy, which the Act was enacted to promote." ALJD FN 51 p. 21.

IV. LOCAL 305 CONFOUNDS WHETHER AN ELECTION MUST OCCUR WITH HOW

In its brief, Local 305 confounds two distinct legal questions: whether the historical separation between Albertsons and Safeway workers would survive the consolidation and whether departmental units would be appropriate in the consolidated warehouse. Amicus, p. 6-9. The first question determines whether the Employer must continue to recognize the pre-consolidation unions in their pre-consolidation units or whether a question concerning representation has arisen. The second question determines what unit or units would be appropriate in a Board election. Only the first question is relevant to this case, and the answer is undisputed: the Albertsons/Safeway distinction has been obliterated. The second question, about the configuration of the new bargaining unit(s), would be relevant only in a later representation proceeding.

As explained further in Local 206's prior brief, when operations involving multiple bargaining units are restructured, the Board will normally maintain the historical bargaining relationships. Respondent Brief on Exceptions, p. 16-18. However, sometimes an employer will integrate operations to such an extent that employees from two different locations "cannot be distinguished . . . without looking to their union insignia." *Id.* at 17 *quoting Panda Terminals, Inc.*, 161 NLRB 1215, 1221 (1966). At that point, maintaining the historical bargaining relationships would be repugnant to the purposes of the Act, and a question concerning

representation arises unless one of the unions has a "sufficiently predominant majority" to preclude a QCR. Respondent Brief on Exceptions, p. 16-26.

The ALJ correctly found that is what occurred in this case. ALJD p. 20-21; *see also* ALJD p. 15-16, p. 28 FN 59. Historically, Safeway and Albertsons employees had been represented by different unions, but the Employer "obliterated" the distinction between Safeway and Albertsons employees. *Id.* Safeway and Albertsons employees now work side-by-side in the freezer, in the produce room, and on the loading dock. *Id.* There is no way to tell them apart but their insignia. Neither Local 305 nor any party to this case contends that the distinction between Safeway and Albertsons employees can be maintained. *Id.*; Amicus, p. 4-5; General Counsel's Brief in Support of Exceptions, January 8, 2018, p. 17-19, 33-34 (arguing CDC employees accreted into PDC bargaining unit and transfer "obliterated" CDC units); Employer's Brief in Support of Exceptions, January 8, 2018, p. 23-25 (arguing accretion and overwhelming community of interest between former CDC and PDC employees).

Therefore, absent a "sufficiently predominant majority," the consolidation created a question concerning representation.[2] *See* Respondent Brief on Exceptions, p. 16-26. Local 206 demonstrated that Local 305 never had a sufficiently predominant majority for the unit for which it was recognized, a wall-to-wall unit in the consolidated warehouse. Respondent Brief on Exceptions, p. 23-29. Therefore, the Employer was neither required nor permitted to recognize Local 305 for that unit. Therefore, Local 206 did not violate the Act by refusing to be bound by that recognition.

In its amicus, Local 305 confounds the question of whether the Safeway/Albertsons distinction has been obliterated with the question of whether there should be a wall-to-wall unit in the consolidated warehouse. Amicus, p. 6-8. The latter question is irrelevant to this case.

[2] Amicus argues that because the UFCW and IAM "acquiesced" the representation rights of their former members could be ignored by forcing them to accept representation by Local 305. Amicus, p 3-4. One union cannot lawfully agree that its members will be represented by another union; all the union can do is disclaim interest in representation and allow the Board's normal process to determine subsequent representation.

Local 206 agrees with Local 305 and the Employer that a wall-to-wall unit is *an* appropriate unit for the consolidated warehouse. However, the Employer was not permitted to recognize Local 305 as the representative of that unit without an election because Local 305 lacked a sufficiently predominant majority in that unit. Respondent Brief on Exceptions, p. 23-29.

The parties disagree about whether smaller units (such as truck drivers or employees in particular departments) might also be appropriate. The answer to that question might affect the details of how an election should conducted.[3] But the details of *how* and election should be conducted do not determine *whether* an election should have been conducted. Whether smaller units might be appropriate or not, the Employer could not recognize Local 305 as the representative of a wall-to-wall unit without an election.

The points Local 305 makes about *Martin Marietta*, *Panda Terminals*, *Matlack*, *Trident Seafoods*, and *Mallinckrodt Chemical Works* all rest upon this basic error. Amicus, p. 7-9 *citing Martin Marietta Co.*, 270 NLRB 821 (1984); *Panda Terminals*, 161 NLRB 1215; *Matlack, Inc.*, 278 NLRB 246 (1986); *Trident Seafoods Inc. v. NLRB*, 101 F.3d 111 (D.C. Cir. 1996); *Mallinckrodt Chemical Works*, 162 NLRB 387 (1966).[4]

[3] The question of whether smaller units than a wall-to-wall unit are appropriate would, of course, be answered during representation proceedings. It is possible that it would be appropriate to have either a wall-to-wall unit or smaller units would be appropriate. *PCC Structurals, Inc.*, 365 NLRB No. 160, slip op. p. 5 (2017). If so, and if one union sought a wall-to-wall and another a smaller unit, then the Regional Director could order an *Armour Globe* election. *See, e.g. Grace Industries, LLC*, 358 NLRB 502, 508 (2012). However, the Board need not decide in this case whether an *Armour Globe* election might be appropriate.

[4] If the Board wishes an explanation of how *Martin Marietta*, *Panda Terminals*, *Matlack*, and *Trident Seafoods* apply to the issue actually before it, explanations can be found at pages 18-21 of the ALJD and pages 16-22 of Local 206's brief. *Mallinckrodt Chemical Works* has no relevance to the issues currently before the Board, namely whether the Employer's recognition of Local 305 was proper. 162 NLRB at 387. At most it is relevant to one theory a union might use to seek a unit smaller than a wall-to-wall unit. *Id.*

V. EACH EMPLOYEE COUNTS ONCE AND ONLY ONCE

Local 305 next proposes that to determine whether it had a sufficiently predominant majority of the consolidated wall-to-wall unit, the ALJ should have "compared each separate CDC unit to Local 305's pre-existing wall-to-wall PDC unit." Amicus, p. 8. This is a variation on the maneuver the ALJ termed slicing up a lion into "bite-sized pieces" a mouse could swallow. ALJD p. 20 FN 48.[5]

Comparing the entire PDC wall-to-wall unit against each CDC department one at a time has the effect of counting each presumed supporter of Local 305 multiple times – every employee from the PDC is counted each time any department from the CDC is considered. However, each presumed supporter of the other unions is only counted once – only when their particular department at the CDC is considered. Obviously, this maneuver grossly inflates the support for Local 305.[6]

The Employer recognized Local 305 for a wall-to-wall unit including all employees from both PDC and CDC. Therefore, Local 305 must demonstrate a sufficiently predominant majority of precisely that unit – the entire, consolidated, wall-to-wall unit. The operation is quite simple. One first counts the total number of people in the wall-to-wall unit after the merger. Then one counts how many of those people came from 305-represented units. Then one determines what percentage the 305-represented employees are of the total.[7]

---

[5] Under the theory of amicus, if there were an existing unit of 50 employees and the employer then merged another facility with three separate units of 40 each, the employer could lawfully recognize the union representing only 50 out of a total of 170 employees.

[6] As another analogy, consider applying Local 305's proposed methodology to the most recent Presidential election. All of the supporters for Hillary Clinton in the entire United States would be counted against the supporters of Donald Trump in Oregon only. Obviously, Clinton would win. Then all the supporters for Clinton nation-wide would be counted against Trump Supporters in Washington State, and so on.

[7] For examples where the Board has not used Local 305's novel counting methods, consider *National Carloading*, 167 NLRB at 802, 80 FN 20; *Allegheny Pepsi-Cola Bottling Co.*¸ 216 NLRB 616 (1975); *see also Penn-Keystone Realty Corp.*¸ 191 NLRB 800 (1971); *NLRB Casehandling Manual*, Part 2: Representation Proceedings, Section 11091.2(c)(Jan. 2017).

Each employee counts once and only once. That is how democracy works.

VI. GENERAL EXTRUSION IS IRRELEVANT

Local 305 also argues that its contract is a bar under *General Extrusion*. Amicus, p. 9 *citing General Extrusion Company, Inc.*, 121 NLRB 1165 (1958). This argument fails for two reasons. First, in *General Extrusion* only one union represented employees at the time of the transfer at issue; the petitioning union was seeking to establish a new relationship. 121 NLRB at 1165-66. As explained further in Local 206's prior brief, the Board uses different standards to determine when a restructuring requires an election in single-union and multiple-union cases – a union need only show 40% support to avoid an election in the former scenario but a "sufficiently predominant majority" in the latter. Respondent Brief on Exceptions, p. 24-25. In a case involving more than one union, an existing contract is not a bar unless the relevant union has the required sufficiently predominant majority. *Martin Marietta*, 270 NLRB at 822; *National Carloading*, 167 NLRB at 803; *see also Nott Company*, 345 NLRB 396, 401 (2005).

Secondly, the issue in this case is whether the Employer was obliged in the first place to negotiate the contract that Local 305 claims became a bar once finalized. Obviously, the contract was not a bar prior to its negotiation.

VII. THE BOARD SHOULD NOT FORCE LOCAL 305 ON EMPLOYEES TO SAVE THEM

Finally, Local 305 proposes that the ALJ's decision must be vacated, because otherwise the Employer will avoid the question concerning representation by agreeing to seamless transfers for Local 305 members but forcing supporters of other unions to reapply for their jobs. Amicus, p. 9-10. The Board should reject this transparent threat by Local 305 against employees that Local 305 purports to represent. Nor could an employer engage in such a tactic without a violation of section 8(a)(3); 29 U.S.C. § 158 (a)(3).

The Act does not permit the Employer to discriminate in layoffs or hiring to avoid employee free choice. If there is concern that the Employer in this case might so discriminate (a concern the Employer would presumably deny), the solution is to enforce the Act, not to insist the employees at issue be represented by a union they did not choose.

VIII. CONCLUSION

The ALJ was correct. Local 206 took the lawful position that Safeway could not properly recognize Local 305 in a wall to wall unit in the PDC without an election. The dismissal of the complaint as recommended by the ALJ should be affirmed.

Dated: May 16, 2018

Respectfully submitted,

WEINBERG, ROGER & ROSENFELD
A Professional Corporation

/s/ David A. Rosenfeld
By: DAVID A. ROSENFELD

Attorneys for TEAMSTERS UNION LOCAL NO. 206

140367\968129

PROOF OF SERVICE

I am a citizen of the United States and resident of the State of California. I am employed in the County of Alameda, State of California, in the office of a member of the bar of this Court, at whose direction this service was made. I am over the age of eighteen years and not a party to the within action.

On May 16, 2018, I electronically filed the foregoing **RESPONDENT'S RESPONSE TO TEAMSTERS LOCAL 305'S AMICUS CURIAE BRIEF IN SUPPORT OF SAFEWAY, INC.'S AND GENERAL COUNSEL'S EXCEPTIONS TO ADMINISTRATIVE LAW JUDGE'S DECISION** with the National Labor Relations Board, by using its CM/ECF system.

☑ BY ELECTRONIC SERVICE: By electronically mailing a true and correct copy through Weinberg, Roger & Rosenfeld's electronic mail system from kkempler@unioncounsel.net to the email addresses set forth below.

On the following part(ies) in this action:

Executive Secretary
National Labor Relations Board
1015 Half Street SE
Washington, D.C. 20570-0001

By Electronic Filing

Ms. Jacqueline M. Damm
Ogletree, Deakins, Nash, Smoak & Stewart
222 SW Columbia St., Suite 1500
Portland, OR 97201
jacqueline.damm@ogletree.com

Attorneys for Charging Party, Safeway, Inc.

Mr. John H. Fawley
Counsel for the General Counsel
National Labor Relations Board, Region 19
Jackson Federal Building
915 Second Avenue, Room 2948
Seattle, WA 98174
john.fawley@nlrb.gov

Attorneys for National Labor Relations Board

Mr. John L. Zenor
Attorney at Law
7933 Painted Sunset Drive
Las Vegas, NV 89149
zenorlaw@cox.net

Attorney for Charging Party, Safeway, Inc.

Michael R. McCarthy
Reid, McCarthy, Ballew & Leahy, L.L.P.
100 West Harrison Street, North Tower, Suite 300
Seattle, WA 98118-4143
mike@rmbllaw.com

Attorneys for Amicus Curiae, Teamsters Local 305

I declare under penalty of perjury under the laws of the United States of America that the foregoing is true and correct. Executed on May 16, 2018, at Alameda, California.

/s/ Karen Kempler
Karen Kempler